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No. 79-2002

In The

Supreme Court of the United States

OCTOBER TERM, 1980

KONSKI ENGINEERS, P.C. and JAMES L. KONSKI, P.E.,
Petitioners,

against

ARTHUR LEVITT, Comptroller, State of New York, and NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
Respondents,

ERDMAN, ANTHONY, ASSOCIATES,
Respondents.

BRIEF FOR STATE RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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Opinions Below

Copies of the opinions of the Supreme Court, Albany County, Special Term, unreported, the opinion of the Supreme Court, Appellate Division, Third Department, 69 AD2d 940, and the opinion of the Court of Appeals of the State of New York, 49 NY2d 850, are annexed to the petition.

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 USC §1254(1).

Question Presented

Were petitioner engineering firm or its principal officer denied any due process rights under the Federal Constitution when the State Comptroller refused to approve petitioner's negotiated contract for consulting services, after becoming aware that petitioner was the subject of inquiry in a grand jury investigation relating to corruption in obtaining public contracts?

Statement of the Case

Petitioner engineering firm proposed to enter into a contract with the New York State Department of Environmental Conservation for consulting services in connection with rehabilitation and modifications to Warner Lake Dam, Jamestown, New York. This contract, identified as Contract II, was negotiated instead of publicly bid, and had been preceded by an earlier contract, Contract I, already performed by such firm.

Contract II was signed by petitioner and returned to the Department of Environmental Conservation (DEC) on March 1, 1977 (DEC had advised petitioner it took approximately six weeks for the State to execute a contract). Subsequently, DEC signed the contract and forwarded it to the Comptroller for approval. Section 112(2) of the State Finance Law requires that before any contract made by a State department shall become effective, it shall first be approved by the State Comptroller. In late April, 1977 and May, 1977 petitioner was advised by DEC that the Comptroller refused to forward an approved contract. Nonetheless, according to petitioner's own admission, during May through June, 1977, petitioner did work on Contract II.

By way of background, in the previous summer the Comptroller's office had been served with a subpoena duces tecum to produce all records about contracts with petitioner before a grand jury in New York County for a criminal investigation. In

the following spring, namely April, 1977, at the same time Contract II was being presented for approval, the Comptroller's office received a request from the special prosecutor of Onondaga County for documents relating to petitioner's contracts with the State. This prosecutor was conducting a criminal investigation involving political corruption in the award of public contracts.

Because of the existence of these investigations the Comptroller's office would not approve this negotiated contract. On July 11, 1977 petitioner was informed in writing by DEC that the contract would not be approved by the Comptroller and that DEC had to solicit other bids to take advantage of available federal funds. On September 16, 1977, petitioner's contract was returned by the Comptroller with a formal refusal to approve. As of September 26, 1977 a replacement firm of Erdman, Anthony selected by DEC was approved by the Comptroller.

Meanwhile, on July 18, 1977 petitioner was served with a subpoena duces tecum to appear before the extraordinary special grand jury of Onondaga County with its records. On August 2, 1977 petitioner Konski did so appear. According to petitioner's account it cooperated fully. No indictment was subsequently returned.

On October 12, 1977 petitioner firm and its president commenced the subject proceeding in State Supreme Court seeking to compel the Comptroller to approve the contract for petitioner. The State Supreme Court, Special Term, initially denied petitioner a preliminary injunction in the nature of mandamus, noting its reluctance to delay urgent public projects to benefit private interests. It did order petitioner to join DEC as a party, which petitioner thereafter did. After argument on the merits Supreme Court, Special Term, held that the Comptroller's refusal to approve was arbitrary and capricious. It indicated that the contract had some effect even without the Comptroller's approval and referred the matter to Trial Term for assessment of damages against the respondents.

The respondents appealed from such judgment. In a unanimous decision the Appellate Division, Third Department, reversed the judgment and dismissed the petition (69 AD2d 940). It held that under State statutory law the Comptroller's approval was a condition precedent to State contractual liability* and that there was no liability unless the Comptroller acted arbitrarily or capriciously. It further held that there was a rational basis for the Comptroller's refusal to approve in view of knowledge of the grand jury investigation. It rejected petitioner's argument that the exercise of the Comptroller's discretion was limited to certain fixed categories. The petitioners then appealed to the Court of Appeals, which in a unanimous decision affirmed for the reasons stated in the Appellate Division decision (49 NY2d 850).

REASONS FOR DENYING CERTIORARI

Petitioner had no protected interest in Contract II which would entitle it to due process rights under the Federal Constitution.

Petitioner here claims rights in relation to a contract that never became effective. As an experienced consultant, petitioner knew that the Comptroller's approval was a definite requirement for such contract. Yet petitioner started performance knowing at the time that the Comptroller refused to send an approved contract.

Furthermore it is respondents' position that petitioner firm had no federally protected due process right to enter into a

*State Finance Law, § 112(2) provides in pertinent part:

> "Before any contract made for or by any state department * * * shall be executed or become effective, when such contract exceeds one thousand dollars in amount, * * * it shall first be approved by the Comptroller and filed in his office."

negotiated consultant contract with the State in the circumstances.

This was not a situation of public advertisement or open competitive bids. *Art-Metal-USA, Inc. v Soloman*, 473 F Supp 1 (USDC, DC 1978), cited by petitioners (Br, p 18), was by contrast a competitive purchase of equipment by the government. Petitioner here states that it was low bidder on the preceding Contract I and the State had declared at the outset that the remaining contracts would be let to the consultant awarded Contract I (Br, p 15). These assertions go beyond the record. Petitioner was successful bidder with its proposal for Contract I services but there was no allegation that it was *low* bidder. Negotiations followed its selection. As for the remaining contracts, there was only an "anticipation", not a declaration, in the original solicitation that they would be given to the same firm.

State Finance Law §112(2) is an extremely important statutory safeguard on State procurement. Recovery based on a contract is denied if the Comptroller's approval pursuant to §112(2) has not been obtained (*Joshua A. Becker, M.D., et al. v State*, 65 AD2d 65, affd 48 NY2d 867 [1980]).

In the case at bar the Comptroller was presented with Contract II for approval and the Special Prosecutor's communication virtually at the same time. The Special Prosecutor's request was not a general one, but was directed at this petitioner firm and principal. His investigation involved alleged political corruption in the award of public contracts. The Comptroller's office obviously regarded negotiated contracts as being in a sensitive category. It simply did not want to approve this one with the cloud it perceived over petitioner.

The Appellate Division found that there was a rational basis for the Comptroller's refusal to approve in view of the knowledge that petitioner Konski was under a grand jury investigation at the time the contract was submitted. The Court of Appeals affirmed.

In our argument below we referred to an assumption of risk by petitioners. Petitioner Konski surely was aware of the requirement of Comptroller's approval because he had been involved in other State contracts. The Court of Appeals of this State has consistently emphasized the necessity of complying with statutory requirements for entry into State contracts (*Belmar Contr. Co. v State*, 233 NY 189 [1922]; *Joshua A. Becker, M.D., et al. v State, supra*).

In their own pleadings petitioners stated that throughout the latter part of April and May, 1977 petitioner Konski was informed by DEC that the Comptroller's office would not forward an approved contract and consistently refused to offer any explanation for the delay to DEC. Nevertheless, according to their own account petitioner firm began work on Contract II in May through June, 1977. The Appellate Division found that petitioner not only knew the Comptroller refused to approve Contract II, but continued to work under it despite that persistent refusal.

Petitioners failed to allege any due process rights in their petition by which they commenced this proceeding. While petitioners claimed a due process liberty interest in petitioner's reputation as a part of their overall argument in the memoranda and briefs below, none of the Courts below felt it necessary to comment on such assertions. (Petitioners also made generalized assertions on due process without specifying a right to contract.)

It is interesting to note that while petitioners now argue the State's failure to provide a hearing was a violation of due process (Br, p 23), the record shows no formal request for a hearing — only inquiries. Nor does petitioner explain how the conduct of a hearing would necessarily be compatible with any grand jury proceedings, if such proceedings were still continuing. Elsewhere petitioner concedes that grand jury proceedings have a rule of secrecy (Br, p 25).

Petitioners did not proceed with urgency in asserting rights here. They were notified by letter in July, 1977 that their Contract II would not be approved. They did not commence this proceeding until two months later in October, 1977. Then, because of adding parties, discovery proceedings and procedural matters, it was not argued until February, 1978, some seven months later. When petitioners were refused a preliminary injunction and later a permanent injunction against award to another firm, they took no appeal.

The right of a private party to obtain personal service contract from the government is not on the same level as the right of an individual to continue in government employment. The State must be given some latitude in deciding whom it will engage for its outside consulting arrangements, see *Perkins v Lukens Steel Co.*, 310 US 113 (1939), which recognized power in the government to determine those with whom it will deal and to fix the terms and conditions on which it will make needed purchases.

And even in a direct employment relationship there are limitations to due process rights held by the government employee. The party asserting the right must show more than a unilateral expectation. Such party must show some "legitimate claim of entitlement" *Board of Regents v Roth*, 408 US 564, 577 (1972).

Furthermore the property right asserted must be grounded in some independent source such as the State law, *id.* It has been recognized that "sufficiency of the claim of entitlement must be decided by reference to State law" *Bishop v Wood*, 426 US 341, 344 (1976).

Petitioner here asserts a "reasonable expectation of a contract which has long been considered a property right subject to judicial protection under New York Law" (Br, p 16). In support of such proposition petitioner cites two cases on the trial court level. Neither of these decisions dealt with a governmental

consultant services contract or a contract requiring a statutorily required approval to become effective.

We ask that petitioner's "reasonable expectation" argument be viewed in light of petitioner's admission that it started work on this contract at a time it had been informed that the Comptroller refused to forward an approved contract. At no time during such period did the Comptroller's office lead petitioner to believe it was approved.

The Court of Appeals has made a conclusion of law that the Comptroller had a rational basis for refusing to approve. Regardless of whether this Court would reach the same conclusion, this is an expression of the highest Court of the State as to what it considers the law to be. The Court of Appeals refused to accept petitioner's argument that as a matter of law the Comptroller's discretion was limited to fixed categories. Furthermore, the Court rejected the petitioner's argument that the Comptroller's approval was a condition subsequent. Instead it held that it was a condition precedent under section 112.

The Court of Appeals' decision on rationality together with its findings as to the applicable State substantive law should not be disturbed, *Henry v Mississippi*, 379 US 443, 446-447 (1965).

In their papers petitioners rely on a "liberty interest" protected by the Fourteenth Amendment to practice one's profession without any unjustified label of "infamy" (Br, p 20). They go on to refer to what was "announced" by the Comptroller in rebidding Contract II (Br, p 22). There was nothing in this record to indicate what, if anything, the Comptroller announced to other consulting firms. Nor did the petitioners furnish any information in their pleadings as to what they now call the "Comptroller's reputation damaging remarks" (Br, p 25). Was this simply advice to DEC, that petitioner's firm was under a grand jury investigation? If so, this remark was an accurate statement.

Petitioners argued below that the Comptroller maintained a complete blanket of silence over his reasons for refusing to approve the contract (see, also, Br, pp 12-13). This is not consistent with petitioner's "publication" argument (Br, p 27).

The right to contract is not absolute (*Nebbia v New York*, 291 US 502, 523 [1933]). It is subject to reasonable restraint in the interest of the public welfare (*Breard v City of Alexandria, La.*, 341 US 622). The Comptroller acted out of concern to have a public project completed. The Comptroller also acted to maintain public confidence in governmental expenditures. Clearly, there were special factors involved in denying this personal services contract to petitioners' firm which was being investigated by a grand jury.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: Albany, New York
August 15, 1980

Respectfully submitted,

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